the award of plaintiff, the
The innocent victim of con-
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to achieve equity for other
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gment is AFFIRMED.

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No. 76-2

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eme Court of the United States CLERK

OCTOBER TERM, 1978

No. 78-795

LINEAS MARITIMAS ARGENTINAS,
Petitioner,

vs.

NATHANIEL SAMUELS,
Respondent.

N FOR A WRIT OF CERTIORARI TO THE
ED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENT'S BRIEF IN OPPOSITION

WALTER H. BECKHAM, JR., ESQUIRE and
JOEL D. EATON, ESQUIRE
25 West Flagler Street, Suite 1201
Miami, Florida 33130
Tel: (305) 358-2800
Counsel for Respondent

QUESTIONS PRI

For reasons which will appe
agree that the decision sought
the second and third questions pr
the shipowner. We will respond
tions nevertheless; and although
framed, we will set out the quest
shipowner for the convenience of

1. Whether 33 U.S.C. §905(
and Harbor Workers' Compe
ports to relieve the shipowne
ages for acts or omissions o
the finder of fact to evaluat
centage of fault of the conc
dore and reduce the plaintiff
against the shipowner accord

2. Whether under the 1972 A
§905(b) which abrogated a
action based upon the warra
iness, the shipowner is liabl
ployee of an independent con
presented at the place of w

tradiction of land-based negligence principles allowing the landowner to rely on the contractor's supervisory personnel to relay the warning or knowledge to the employees.

STATEMENT OF THE CASE

We take issue with the petitioning shipowner's statement of the case, and will supplement it briefly in order to provide a more accurate background to this Court. The plaintiff-respondent, a 44 year-old longshoreman and father of three, was hired at the local union hall in the early forenoon to unload steel from the Rio Atuel (T. 237, 241-242).[1] He worked all afternoon in the 'tween decks of the ship's number 3 hatch and broke for supper around 6:00 P.M. (T. 72, 242). When he returned to the ship at 7:00 P.M., darkness had fallen (T. 243, 234, 462). He and his gang then began working in the lower hold of the number 3 hatch, discharging 20′ and 40′ lengths of steel (T. 77, 254, 297, 345). The plaintiff had not been in the lower hold before darkness fell (T. 253).

Access to the lower hold was by way of a vertical ladder on each end of the number 3 hatch opening at the centerline of the ship (T. 298-99). The 40′ lengths of

d, he stepped onto steel, and
e of the ladder which he de-
le left in the stow behind the
feet to ten feet deep (T. 73).

r hold was indisputably the
3, 302-03, 350, 368-69, 396, 398).
own lighting system, the only
vere shining on the main deck
lights were not effective for
nough many ships have integral
r night discharging operations,
78, 79, 98-99, 329-30, 371, 430).
by the Rio Atuel the night
vas four portable drop lights
light was placed in each cor-
the main deck level (T. 244,
d not be lowered down to the
the nature of the discharging
he 40′ lengths of steel had to
ner fashion because they were
ng (T. 75-78, 325). Removing
vitably causes it to swing into
p light cords, breaking them
st place to put the drop lights

the ladder and not in the square formed by the hatch opening, it received no direct illumination from the drop lights (T. 352). The farther the longshoremen moved away from this directly illuminated square, up into the "wings" of the lower hold, the darker it got (T. 84, 326, 368). It was dark enough that when the ship's crew inspected the cargo before turning the hold over to the stevedore, they used flashlights (T. 243, 260, 461). The gang foreman complained to the ship's crew before the accident that "the lights was dim; they had pretty dim lights back there," but they did nothing about it (T. 83, 92). The drop lights were flickering and dimming on more than one occasion between the time work was begun in the lower hold and the plaintiff's accident (T. 81, 92).

The longshoremen had taken a water cooler into the lower hold with them; it was placed back in the wings, out of the way of the steel which was being discharged through the hatch opening (T. 73-74, 247, 347-48). That was the safest place to put it (T. 373, 406). The plaintiff had just finished tying on a load of steel and went into the wings, which is the safest place to be when the steel is brought up by the crane (T. 326, 373-74). When that particular load was being discharged, it knocked out one of the drop lights across the hatch from the void in the

265-66, 466). He stepped into the hole ten or twelve seconds after the drop light had been knocked out (T. 267-68). Immediately after the plaintiff fell into the hole, the gang foreman went to him (T. 82). The gang foreman described the lighting at that time this way: "It was good and dark back there. It wasn't black dark but it wasn't too much light" (T. 83). A fellow longshoreman said, "It was dark up under there" (T. 321, 304). The plaintiff simply described it as "dark" (T. 455); and, elsewhere, that "where the keg sat at, you can just barely see" (T. 270-71).

Although the ship's personnel had inspected the area with flashlights before turning the hold over to the stevedore, there is no evidence in the record that any warning of the dangerous hole was given to the stevedore or any of its employees. The gang foreman did testify that he knew of the presence of the hole, but it is undisputed that the plaintiff did not. The issue of the plaintiff's comparative negligence was submitted to the jury, which found him to be without fault. This finding conclusively establishes that the void was not "open and obvious" to the plaintiff; rather, it was a dangerous dark hole in a dark hold. The jury assessed the plaintiff's damages at $32,500. A lien of approximately $2,800 was imposed on the recovery in favor of the plaintiff's workmen's compensation

single issue presented in *Edmonds*. We
the circumstances are ordinary, however.
exception of *Edmonds*, the "equitable c
the shipping industry has been uniformly
various Courts of Appeals which have con
tion. *Samuels* v. *Empresa Lineas Marit*
573 F.2d 884 (5th Cir. 1978); *Shellman*
Lines, Inc., 528 F.2d 675 (9th Cir. 1975),
U.S. 936 (1976); *Dodge* v. *Mitsui Shinto*
Tokyo, 528 F.2d 669 (9th Cir. 1975), *cert.*
944 (1976). *See Zapico* v. *Bucyrus-Erie*
(2nd Cir. 1978) (characterizing *Edmonds*
579 F.2d at 726, n. 8); *Lopez* v. *A/S D/S*
F.2d 319 (2nd Cir. 1978); *Brown* v. *Ivat*
545 F.2d 854 (3rd Cir. 1976), *cert. denie*
(1977). This Court denied certiorari in ea
which were presented for review. We
tiorari was granted in *Edmonds* for the
correcting its facially erroneous misread
language of 33 U.S.C. §905(b).

The *Edmonds* decision is predicated
and easily demonstrated misunderstandin
of the first two sentences of §905(b).
read in pertinent part as follows:

ich action shall be permitted if the injury was
d by the negligence of persons engaged in pro-
g stevedoring services to the vessel.

onds court badly misread the second sentence
its adoption of the shipping industry's "equitable
lely on this insupportable misreading:

ıd in absolute terms, the first sentence and the
d sentence are in conflict in every case in which
is found on the part of both the ship and the
dore. The first sentence says that if the injury
ısed by the negligence of a vessel the longshore-
may recover, but the second sentence says he
not recover anything of the ship if his injury
caused by the negligence of a person providing
doring services. The sentences are irreconcilable
ıd to mean that any negligence on the part of
ıip will warrant recovery while any negligence
e part of the stevedore will defeat it. They may
rmonized only if read in apportioned terms. The
ıt meaning and intention of the Congress was to
de for liability of the ship to the extent its fault
buted to the injury, while insulating it against
ty to the extent that the stevedore's fault con-
ed to the injury. So read, the sentences are

are dealt with in detail in the previously cited decisions which have rejected the proposal, and we will not belabor them here.

In sum, we think it is apparent that certiorari was granted in *Edmonds* for the sole purpose of correcting it, since its bases are so clearly erroneous. We do not perceive that any serious arguments can be advanced for affirmance of *Edmonds*. Under those circumstances, it is respectfully submitted that it is neither necessary nor desirable to grant certiorari in this case, notwithstanding that certiorari was granted in *Edmonds*. In the event that certiorari is granted in this case on the "equitable credit" issue, we would respectfully request an opportunity to file a brief on the merits in order to protect our position, rather than be relegated to summary disposition upon determination of *Edmonds*—because we perceive that the *Edmonds* court was not presented with several important arguments which should be thoroughly presented to this Court before any determination of the question is reached.

2. The "open and obvious" danger doctrine is not presented in this case, there is no significant conflict of decisions, and certiorari should not be granted on this question.

Imm. & Nat. Serv., 385 U.S. 630 (
asking this Court to again revie
evidence—which this Court has c

> to review individualized p
> which the sole issue is suf
> seems . . . not only to disr
> function, but to deflect the
> mass of important and difficu

Sentilles v. *Inter-Caribbean Corp.*,
(Stewart, J., concurring).

In the second place, *Cox* d
obvious" danger. The shipowner'
is similar to *Cox* is predicated u
terization of the dark hole into w
an "open and obvious" hazard.
however, was not charged on "op
It was instructed only that the s
exercise reasonable care to have
safe condition for use by the ste
stevedore warning of any conceal
T. 547). In addition, the jury f
without comparative fault, conclu
tion that the dark hole presente

with respect to liability for open and obvious dangers,[2] and the issue is not raised on appeal.

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2. The vessel owner may incur liability even when the danger is open and obvious if the employee was not in a position fully to appreciate the risk or to avoid the danger even though aware of it. *Gay, supra,* 546 F.2d at 1241.

573 F.2d at 886.[6] Even if this question had been raised below, this Court has recently indicated that it will not grant certiorari to decide a question not passed upon in the decision of the Court of Appeals. *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 163-64 (1975). In short, no question of an "open and obvious" danger is presented by this case in its present posture; there is no conceivable conflict with *Cox* as a result; and there is no need for this Court to grant certiorari on this issue to simply rubber-stamp an already uniform standard of care.

Even if this case arguably presented a question as to liability for an "open and obvious" danger, there is no significant conflict with *Cox*. Notwithstanding the ship-owner's suggestion that *Cox* holds there is no liability for "open and obvious" dangers created by the ship and known

ged by cargo being hoisted out
en suggested as the only possi-
of the accident was an operation
of the stevedore.

ident was caused solely by the
can be no liability on the part
t reasonably be asserted in the
edore was the sole proximate
in view of the dark hole and
ng supplied by the ship, the
danger or warn of its presence,
knowledge of the unseen hole

arguably absolves a shipowner
open and obvious" danger cre-
uit has both ignored and effec-
of *Cox*. *Napoli* v. [*Transpacific
Cargo Carriers, Inc.*] *Hellenic*
2nd Cir. 1976); *Lopez* v. *A/S*
319 (2nd Cir. 1978); *Canizzo*
.2d 682 (2nd Cir. 1978), *cert.*
No. 78-358; October 30, 1978);
ds Steamship Co., 572 F.2d 364

certiorari in either *Cox* or *Canizzo*, it is inappropriate to grant certiorari on this issue in this case.

Finally, we would note that the shipowner's reliance upon the "open and obvious" danger doctrine as an absolute bar to liability, even if it were presented in this case, is reliance upon a soundly discredited artifact. Modern notions of landowner/shipowner responsibility recognize that the obviousness of a danger is not dispositive of the question of reasonable care. The "open and obvious" danger doctrine says, in effect, that a plaintiff is absolutely barred where he is injured in an encounter with a hazard which was so obviously dangerous that the plaintiff *must* have known of and appreciated the risk, but voluntarily encountered it nonetheless. That is a classic statement of the disfavored defense of assumption of the risk. The "open and obvious" danger doctrine is clearly an assumption of the risk defense in a "no-duty" disguise.

The assumption of the risk defense has been almost universally merged into the doctrine of comparative negligence in recent years, in both the landowner/shipowner liability and products liability context. *See, e.g., Blackburn* v. *Dorta*, 348 So.2d 287 (Fla. 1977). Numerous courts have recognized in both contexts that the "open and obvious"

467 P.2d 229 (1970); *Rourke* v. *Garza*, 530 S.W.2d 794 (Tex. 1975); *Beloit Corp.* v. *Harrell*, 339 So.2d 992 (Ala. 1976); *Olson* v. *Chesterton Co.*, 256 N.W.2d 530 (N.D. 1977); *Brown* v. *North American Mfg. Co.*, 576 P.2d 711 (Mont. 1978). Congress has expressly prohibited an assumption of the risk defense in §905(b) actions, and the Courts of Appeals have almost universally adopted Restatement (2nd) of Torts, §343A to provide a vehicle for the merger of assumption of the risk into comparative negligence in actions against shipowners. *See Napoli, supra; Gay, supra.*

We do not think the question of "open and obvious" dangers is even presented ir this case, nor do we think there is any significant conflict with *Cox*. Even if the question were presented here, and conflict sufficient to invoke this Court's jurisdiction existed, we do not perceive that this Court is prepared to undo universal developments in modern tort law, and reerect an assumption of the risk defense as an absolute bar in §905(b) actions, where Congress has prohibited the defense—especially in a case where the jury found the plaintiff to be without comparative fault. For these reasons, it is respectfully submitted that certiorari should not be granted on this issue.

3. Neither the decision below nor the record

Moreover, the contention urged he
aground on the express intention of Co

> Permitting actions against the vesse
> gence will meet the objective of e
> because the vessel will still be req
> the same care as a land-based perso
> safe place to work. Thus, nothing
> tended to derogate from the vessel's
> take appropriate corrective action w
> should have known about a dangerou
>
> So, for example, where a longshorem
> spill on a vessel's deck and is injur
> amendments to Section 5 would still
> against the vessel for negligence. To
> establish that: (1) the vessel put
> stance on the deck, or knew that i
> willfully or negligently failed to rem
> foreign substance had been on the
> period of time that it should have bee
> removed by the vessel in the exerc
> care by the vessel under the circum

H.R. Rep. No. 92-1441, U.S. Code Con
92nd Cong., 2d Sess. 4698, 4704 (1972).[7]